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CURRENT LEGAL DEVELOPMENTS

The *MOX Plant* and *IJzeren Rijn* Disputes: Which Court Is the Supreme Arbiter?

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Abstract
The *MOX Plant* and *IJzeren Rijn* disputes illustrate the growing problem of concurrent jurisdiction between international courts and tribunals and the ECJ. This article argues that in cases in which Community law is involved in a dispute between two EC member states, international courts and tribunals must accept the exclusive jurisdiction of the ECJ under Article 292 of the EC Treaty to decide these cases. However, only the UNCLOS arbitral tribunal in the *MOX Plant* case stayed the proceedings and requested that the parties first find out whether the ECJ had jurisdiction, whereas the OSPAR as well as the *IJzeren Rijn* arbitral tribunals rendered their awards despite the implications of Article 292. Thus it appears that every arbitral tribunal decides the issue of Article 292 as it sees fit. This situation, it is argued, requires the creation of some sort of hierarchy between the growing number of international courts and tribunals in order to co-ordinate and harmonize their decisions so as to avoid a fragmentation of international law.

Key words
arbitral tribunals; concurrence of jurisdiction; European Court of Justice; hierarchy of norms; *IJzeren Rijn* case; international adjudication; international courts and tribunals; *MOX Plant* case

1. Introduction

In the past decade there has been a proliferation of international courts and tribunals.[1] This proliferation can be seen either as a positive sign of an ongoing process of constitutionalization of international law or as a negative sign of an increasing fragmentation of international law, which is enhanced by the lack of hierarchy and co-ordination between the various international courts and tribunals.[2] This lack of co-ordination is further complicated by the growing involvement of the European Court of Justice (ECJ) in matters involving international law aspects.

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1. See C. Romano, 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle', (1999) 31 *NYU Journal of International Law and Politics* 709; C. Brown, 'The Proliferation of International Courts and Tribunals: Finding Your Way through the Maze', (2002) 3 *Melbourne Journal of International Law* 453.
2. See for a detailed discussion N. Lavranos, 'Concurrence of Jurisdiction between the ECJ and Other International Courts and Tribunals', (2005) 14 *European Environmental Law Review* 213; G. Hafner, 'Pros and Cons Ensuing from Fragmentation', (2004) 25 *Michigan Journal of International Law* 849; J. Alvarez, 'The New Dispute Settlers: (Half) Truths and Consequences', (2003) 38 *Texas International Law Journal* 405.

Consequently a dispute involving legal issues pertaining to both international law and EU law can (potentially) be referred to both the ECJ and an international court or tribunal. In other words, a competition or concurrence of jurisdiction between the European and international courts is currently taking place.[3] The *MOX Plant* and *IJzeren Rijn* disputes are recent and illuminating examples of the increasing concurrence of jurisdiction between the ECJ and international courts and tribunals. The common feature of both cases is that each concerned a dispute involving international law and (potentially) EC law. Although in both cases the parties to the dispute were EC member states, the cases were brought before international arbitral tribunals. This raises the central legal issue in both cases, namely which court or tribunal is the appropriate arbiter to decide the disputes – the international arbitral tribunals or the ECJ? The crucial provision on which the answer to this question hinges is Article 292 of the EC Treaty, which provides that all disputes between EC member states involving Community law must be brought exclusively before the ECJ. However, in spite of this, the parties to the disputes brought their cases first before international arbitral tribunals.

The aim of this article is to analyse the way in which the different international arbitral tribunals dealt with the potentially concurring jurisdiction of the ECJ. First, the *MOX Plant* case is discussed. This case involved two different arbitral proceedings, namely, before arbitral tribunals set up under the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR) and the UN Convention on the Law of the Sea (UNCLOS). Second, the award of the *IJzeren Rijn* arbitral tribunal is examined. Third, a detailed analysis of the three arbitral tribunal awards is provided. Finally, several possible ways of creating some sort of hierarchy or at least co-ordination between international courts and tribunals are presented.

2. The *MOX Plant* case

2.1. The facts

Since the full details of the *MOX Plant* case have been described elsewhere, I will confine myself to a short summary of the facts that are relevant for our purposes.[4]

In this dispute Ireland lodged a complaint against the United Kingdom relating to the radioactive discharges of the MOX plant in Sellafield. The dispute between Ireland and the United Kingdom involved two different aspects. First, Ireland wanted to obtain from the United Kingdom all available information regarding the MOX Plant by relying on Article 9 of OSPAR. Article 9(2) OSPAR requires the contracting parties to make available all information 'on the state of the maritime area, on

3. See generally Y. Shany, *The Competing Jurisdictions of International Courts and Tribunals* (2003); J. Martinez, 'Towards an International Judicial System', (2003) 56 *Stanford Law Review* 429.

4. See for the materials of the dispute Permanent Court of Arbitration, available at www.pca-cpa.org. See for details Y. Shany, 'The First *MOX Plant* Award: The Need To Harmonize Competing Environmental Regimes and Dispute Settlement Procedures', (2004) 17 *Leiden Journal of International Law* 815; V. Röben, 'The Order of the UNCLOS Annex VIII Arbitral Tribunal to Suspend Proceedings in the Case of the MOX Plant at Sellafield: How Much Jurisdictional Subsidiarity?', (2004) 73 *Nordic Journal of International law* 223; R. Churchill and J. Scott, 'The *MOX Plant* Litigation: The First Half-life', (2004) 53 *International and Comparative Law Quarterly* 643.

activities or measures adversely affecting or likely to affect it'. Second, Ireland believed that the released discharges of the MOX Plant contaminated its waters and therefore constituted a violation of UNCLOS. Accordingly, Ireland essentially sought the disclosure of information regarding the MOX Plant from the United Kingdom on the basis of the OSPAR Convention as well as a declaration that the United Kingdom had violated its obligations under UNCLOS. After lengthy negotiations Ireland and the United Kingdom agreed to establish arbitral tribunals under both UNCLOS and OSPAR in order to resolve the dispute. Hence two arbitral tribunals were asked to determine the dispute, one on the basis of UNCLOS and the other on the basis of the OSPAR Convention. However, as will be seen below, various aspects of EC law were also potentially involved in both the UNCLOS and the OSPAR proceedings. Consequently, it could be argued that there was exclusive jurisdiction of the ECJ, based on Article 292 EC, to decide this dispute.

2.2. The UNCLOS arbitral decision

In relation to the UNCLOS proceedings, it should be noted that UNCLOS provides for a whole menu of various fora that can be selected by the contracting parties in order to settle their disputes.[5] Accordingly, parties can select as a dispute settlement forum the International Tribunal for the Law of the Sea (ITLOS), the International Court of Justice (ICJ), or arbitral tribunals. Moreover, UNCLOS explicitly accepts the jurisdiction of fora established by regional or bilateral agreements, such as the ECJ.

As the parties had not commonly designated any other dispute settlement forum, the dispute had to be submitted to an arbitration procedure in accordance with Annex VII, Article 287(5) UNCLOS. However, pending the establishment of this arbitral tribunal, Ireland requested from ITLOS interim measures as provided for in Article 290(5) UNCLOS. Ireland demanded that the United Kingdom be ordered to suspend immediately the authorization of the MOX Plant or at least take all measures instantly to stop the operation of the MOX Plant. As regards jurisdiction, ITLOS determined that prima facie the conditions of Article 290(5) UNCLOS were met, that is, the Annex VII arbitral tribunal had jurisdiction to decide the merits of the case.[6] As regards substance, ITLOS ordered both parties to co-operate and to enter into consultations regarding the operation of the MOX Plant and its emissions into the Irish Sea, pending the decision on the merits of the arbitral award.[7]

The arbitral tribunal began by confirming the finding of ITLOS that it had prima facie jurisdiction.[8] However, the arbitral tribunal then considered it to be necessary to determine whether it indeed had definite jurisdiction to solve the dispute, in

5. See Arts. 287–8 as well as Arts. 281–2 UNCLOS for the various possibilities.
6. ITLOS, Order, *MOX Plant case*, Request for Provisional Measures, Order of 3 December 2001, available at www.itlos.org.
7. Ibid.
8. Arbitral tribunal, Order No. 3, Suspension of Proceedings on Jurisdiction and Merits and Request for further Provisional Measures, 24 June 2003, available at www.pca-cpa.org.

particular in view of the United Kingdom's objection that the ECJ probably had jurisdiction in the case, since Euratom and EC environmental legislation was also at issue. In the end, the arbitral tribunal accepted the United Kingdom's objection and consequently stayed the proceedings and requested the parties to find out first whether the ECJ had jurisdiction before it would proceed in rendering a decision on the merits.[9]

Before the parties took such action, the European Commission started an infringement procedure against Ireland for violating Article 292 EC and the identical provision in the Euratom Treaty.[10] The Commission argued that Ireland had instituted the proceedings against the United Kingdom without taking due account of the fact that the EC was a party to UNCLOS.[11] In particular, the Commission claimed that by submitting the dispute to a tribunal outside the Community legal order, Ireland had violated the exclusive jurisdiction of the ECJ as enshrined in Article 292 EC and Article 193 of Euratom. Furthermore, Ireland had also violated its duty to co-operate under Article 10 EC and Article 192 Euratom.

The case is currently pending before the ECJ. If the ECJ accepts jurisdiction in this case and renders a judgment, this will – according to the UNCLOS arbitral tribunal – preclude the jurisdiction of the arbitral tribunal. Thus, by staying the proceedings and allowing the ECJ to determine whether or not it has jurisdiction, the UNCLOS arbitral tribunal prevented from the outset any problems regarding the concurrence of jurisdiction and possible conflicting rulings on the same issue and in the same dispute.

2.3. The OSPAR arbitral decision

In contrast to the UNCLOS arbitral tribunal, the OSPAR arbitral tribunal felt less need for restraint. In its decision of 2 July 2003 the OSPAR arbitral tribunal asserted jurisdiction and rendered a final award.[12] As regards the possible implications of EC law, the OSPAR arbitral tribunal refused to take into account any other sources of international law or European law that might potentially be applicable in the dispute. Whereas Article 32(5)(a) of OSPAR states that the arbitral tribunal shall decide according to the 'rules of international law, and, in particular those of the [OSPAR] Convention', which implies a broad range of norms that could be applied, the OSPAR arbitral tribunal argued that the OSPAR Convention had to be considered to be a 'self-contained' dispute settlement regime, such that the tribunal could base its decision only on the OSPAR Convention.[13] In other words, the tribunal did not consider itself to be competent to take into account other relevant sources of international law or European law (in particular EC Directive

9. Ibid.
10. Case C-459/03, Action brought on 30 October 2003 by the Commission against Ireland, [2004] OJ C 7/24.
11. Council Decision 98/392/EEC of 23 March 1998 concerning the conclusion by the EC of the UN Convention of 10 Dec. 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof, [1998] OJ L 179/1.
12. OSPAR, Arbitral Tribunal, Final Award, *MOX Plant*, available at www.pca-cpa.org.
13. Ibid., para. 143.

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90/313,[14] now replaced by EC Directive 2003/4 [15]); relevant ECJ jurisprudence;[16] or the Convention on access to information, public participation in decision making, and access to justice regarding environmental matter ('the Aarhus Convention') of 1998, which has been ratified by all EC member states and recently also by the EC itself.[17]

In substance, the OSPAR arbitral tribunal decided that the United Kingdom had not violated its obligations under OSPAR by not disclosing the information sought by Ireland.[18] The OSPAR arbitral tribunal ignored the implications of the potential exclusive ECJ jurisdiction based on Article 292 EC.

3. THE *IJZEREN RIJN* CASE

3.1. The facts

The *IJzeren Rijn* case essentially concerned a dispute between the Netherlands and Belgium regarding which of the parties had to pay the costs for the reopening of an old railway line.[19] The IJzeren Rijn railway line was one of the first international railway lines in mainland Europe in the nineteenth century, running from Antwerp in Belgium through the Netherlands to the Rhine basin area in Germany. Belgium obtained a right of transit through the Netherlands on the basis of two treaties dating respectively from 1839 (Treaty of Separation) and 1897 (Railway Convention). After 1991 the railway line was not used, and the Netherlands designated an area it crossed (the Meinweg, close to the city of Roermond) as a protected natural habitat. At some point Belgium expressed the intention to start using the railway line again. Accordingly discussions took place between Belgium and the Netherlands regarding the reopening of the railway line. The environmental impact studies that were conducted to assess the possibility of a reopening of this railway line determined that additional costs of about €500 million would be involved in order to meet the applicable environmental standards. Since no agreement was reached on who should pay the costs, both states agreed to solve the dispute by bringing it before an arbitral tribunal established under the auspices of the Permanent Court of Arbitration (PCA). In the agreement between the Netherlands and Belgium, the arbitral tribunal was

14. Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment, [1990] OJ L 158/56.
15. Directive 2003/4 of the EP and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, [2003] OJ L 41/26.
16. See, e.g., Case C-186/04 (*Housieaux*), Judgment of 21 April 2005; Case C-233/00 (*Commission v. France*) [2003] ECR I-6625; Case C-316/01 (*Glawischnig*) [2003] ECR I-5995; Case C-217/97 (*Commission v. Germany*) [1999] ECR I-5087; Case C-321/96 (*Wilhelm Mecklenburg v. Kreis Pinneberg – Der Landrat*) [1998] ECR I-3809.
17. Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the EC, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, [2005] OJ L 124/1.
18. See further T. McDorman, 'Access to Information under Art. 9 OSPAR Convention (*Ireland v. UK*), Final Award', (2004) 98 AJIL 330. See generally R. Gertz, 'Access to Environmental Information and the German Blue Angel – Lessons To Be Learned', (2004) 13 *European Environmental Law Review* 268; R. Hallo (ed.), *Access to Environmental Information in Europe: The Implementation and Implications of Directive 90/313/EEC* (1996).
19. See for details the Dutch official gazette *Tractatenblad*, 2003, 138; Tweede Kamer, vergaderjaar 2004–5, 29 579, nr. 15; Tweede Kamer, 23 November 2004, TK 26–1659.

called on to settle the dispute on the basis of international law, including if necessary European law, while at the same time respecting the obligations of the parties arising out of Article 292 EC.

Although this dispute at first glance involved purely international law aspects, the parties recognized from the outset that European law, in particular Article 292 EC, could be potentially relevant. Thus they requested the arbitral tribunal to consider this issue as well.

3.2. The *IJzeren Rijn* arbitral decision

Before discussing the decision of the *IJzeren Rijn* arbitral tribunal, especially regarding the issue of Article 292 EC and the relevance of EC law in general for this dispute, it seems appropriate to summarize the position of the parties on that point.

Although neither of the parties challenged the jurisdiction of the arbitral tribunal, Belgium discussed in its submission the issue of Article 292 EC. Belgium argued that even though both parties made references to EC law in their pleadings, 'such references do not constitute sufficient reason to conclude that Article 292 EC had been violated'.[20] More specifically, Belgium distinguished the present dispute from the *MOX Plant* case by arguing that 'unlike the UK in the *MOX Plant* case, the Netherlands had not objected to Belgium's references to EC law in its Memorial'.[21] Moreover, Belgium argued that neither party was contending that the other had violated EC law and that 'issues where Community law comes into play in the present case really boil down to the apportionment of costs, which is not a matter of Community law'.[22] Finally, it should be noted that both parties wrote a letter to the Secretary-General of the European Commission in which they stated that the core of the dispute concerned the 1839 treaty. However, both parties committed themselves to taking all necessary measures to comply with Article 292 EC should the eventuality of an application or interpretation of Community law arise. In other words, both the Netherlands and Belgium essentially argued that EC law – including Article 292 EC – was not directly relevant for deciding the dispute.

The arbitral tribunal began its analysis concerning Article 292 EC by stating, 'in regard to the limits drawn to its jurisdiction by Article 292 EC, it finds itself in a position analogous to that of a domestic court within the EC'.[23] The arbitral tribunal continued by stating that if it arrived at the conclusion that it could not decide the case without engaging in the interpretation of EC law which constituted neither *actes clairs* nor *actes éclairés* (i.e. the so-called CILFIT conditions), the obligation of Article 292 EC would be triggered and the dispute would have to be submitted to the ECJ.[24] Accordingly, the arbitral tribunal examined whether or not in the present

20. *IJzeren Rijn*, Arbitral Award, para. 13, available at www.pca-cpa.org.
21. Ibid., para. 14.
22. Ibid.
23. Ibid., para. 103.
24. Ibid.

case the CILFIT conditions were met. The ECJ had developed the CILFIT conditions in its jurisprudence concerning the obligation of national courts of the EC member states to refer preliminary questions to the ECJ.[25] According to that jurisprudence, the obligation of national courts to refer preliminary questions to the ECJ is only waived (i) if the question is not relevant; (ii) if it has already been answered by the ECJ; or (iii) if the answer is entirely clear so that there is no need for the ECJ to give one.[26] It should be noted that the arbitral tribunal only examined the first possibility, that is, whether the application of Community law was necessary for rendering its award.

The parties raised three aspects of Community law: (i) provisions regarding trans-European rail networks (Arts. 154–156 EC); (ii) EC environmental legislation; and (iii) Article 10 EC, the loyalty obligation.

As regards trans-European rail networks (TEN), the arbitral tribunal noted from the outset that even though

> the parties do not appear actually to be in dispute concerning the 'interpretation or application' of the relevant provisions of EC law (and thus it seems that in this regard a 'dispute' within the meaning of Article 292 EC has not arisen at all) a brief review of the provisions of the EC Treaty on the TEN system and of the relevant secondary EC law, as well as of the respective arguments of the parties, is necessary.[27]

Despite the fact that the IJzeren Rijn railway had been earmarked as a priority project within the TEN, the arbitral tribunal concluded that this fact

> does not give rise to the necessity for the Tribunal to engage in the interpretation of EC law (i.e. TEN) in the sense set out above (see paras. 99–105) [the CILFIT conditions], because this inclusion has not created any rights, or obligations, for the parties that go beyond what Article XII of the 1839 Treaty of Separation already provides for. Thus, the points of EC law put forward by the parties are not conclusive for the task of the Tribunal.[28]

Accordingly, the arbitral tribunal stated that 'as a result, to use the terms of Article 234 EC, in the context of the TEN system, it is not necessary for the Tribunal to decide on any question of interpretation of EC law. Thus the obligation under Article 292 EC does not come into play.'[29]

25. Case 283/81 (*CILFIT*) [1982] ECR 3415; as clarified in case C-244/01 (*Köbler*) [2003] ECR I-10239. But see the recent Opinion of AG Colomer in case C-461/03 (*Gaston Schul*) of 30 June 2005, in which he calls for a relaxation of the CILFIT conditions, available at http://curia.eu.int/jurisp/cgi-bin/form.pl?lang = en. In its ruling the ECJ refused to follow AG Colomer and instead confirmed the CILFIT conditions, see case C-461/03 (*Gaston Schul*) of 6 December 2005.
26. See further P. Craig and G. De Búrca, *EU Law* (2003), 440 et seq.
27. *IJzeren Rijn*, Arbitral Award, *supra* note 20, para. 107.
28. Ibid., para. 119.
29. Ibid., para. 120.

As regards EC environmental legislation, the so-called 'Habitats Directive' 92/43,[30] especially Article 6, was the focus of the discussion between the parties.[31] Again, the arbitral tribunal set out the framework of its jurisdiction by stating that

> from the viewpoint of Article 292 EC the question thus faced by the Tribunal is the same as that posed with regard to the law of the trans-European rail network: does the Tribunal have to engage in the interpretation of the Habitats Directive in order to enable it to decide the issue of the reactivation of the Iron Rhine railway and the costs involved?[32]

The Netherlands designated the Meinweg area which the IJzeren Rijn railway crosses a 'special area of conservation' according to the Habitats Directive, and additionally identified it as a national park and a 'silent area' under its domestic legislation. Moreover, in 1994 the Netherlands also identified the Meinweg as a special protection area in accordance with the Birds Directive. However, the Birds Directive was superseded by the Habitats Directive as far as is relevant to the present dispute.

After discussing the arguments of the parties, the arbitral tribunal turned its attention to the question of the legal basis on which the Meinweg area was designated a specially protected habitat area. According to the arbitral tribunal, this designation occurred in the first place on the basis of Dutch environmental legislation and not on the basis of the EC Habitats Directive. The arbitral tribunal then proceeded to

30. Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, [1992] OJ L 206/7; see also the unofficial consolidated text of the Directive published in 2003, available at CELEX no. 392L0043.

31. Art. 6 of the Habitats Directive reads as follows: 'Article 6 1. For special areas of conservation, member states shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites. 2. member states shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive. 3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public. 4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted. Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.' See for a recent case concerning Art. 6 of the Habitats Directive: Opinion of AG Kokott in case C-6/04 (*Commission v. UK*) of 9 June 2005 and judgment of the ECJ in case C-6/04 (*Commission v. UK*) of 20 October 2005.

32. *IJzeren Rijn*, Arbitral Award, *supra* note 20, para. 121.

determine whether it had to interpret the Habitats Directive to render its award in the light of the CILFIT conditions. The arbitral tribunal concluded,

> the Tribunal has examined whether it would arrive at different conclusions on the application of Article XII to the Meinweg tunnel project and its costs if the Habitats Directive did not exist. The Tribunal answers this question in the negative, as its decision would be the same on the basis of Article XII and of Netherlands environmental legislation alone. Hence the questions of EC law debated by the parties are not determinative, or conclusive for the Tribunal; it is not necessary for the Tribunal to interpret the Habitats Directive in order to render its award. Therefore, as in the case of the TEN, the questions of EC law involved in the case do not trigger any obligations under Article 292 ECT.[33]

Similarly, the arbitral tribunal found that 'the question of obligations arising under Article 10 EC in the context of the dispute does not have to be decided by the Tribunal; it is not determinative or conclusive in the sense of bringing Article 292 EC into play'.[34]

In sum, the arbitral tribunal was able to render its award without considering EC law (the Habitats Directive or Article 292 EC) as an obstacle. In substance, the arbitral tribunal concluded that the Netherlands had to grant a right of transit to Belgium and to pay most of the costs for the reopening of the railway line. Indeed, the Belgian government has already announced its intention to start using the IJzeren Rijn railway line again as soon as possible,[35] and, more recently, the Dutch government announced that a section of the IJzeren Rijn railway line would be operational as of October 2005.[36]

4. Analysis

The summary of the three arbitral awards (UNCLOS, OSPAR, and *IJzeren Rijn*) illustrates the very different approaches adopted by the tribunals towards the issue of Article 292 EC. The UNCLOS arbitral tribunal indicated that it was mindful of the potential problems related to its jurisdiction vis-à-vis the ECJ jurisdiction by staying the proceedings and requesting the parties first to find out whether or not the ECJ indeed had jurisdiction. In contrast, the OSPAR arbitral tribunal took the opposite position by seizing its jurisdiction and rendering a final award without any discussion of Article 292 EC. The *IJzeren Rijn* arbitral tribunal took a position between those of the other two tribunals by discussing at length the possible application of Community law that would trigger jurisdiction of the ECJ, ultimately coming to the conclusion that it could render its award without the application of Community law. Thus, whereas the UNCLOS arbitral tribunal tried from the outset to avoid a conflict

33. Ibid., para. 137.
34. Ibid., para. 141.
35. '*IJzeren Rijn* snel beperkt in gebruik nemen', *Het Laatste Nieuws*, 9 June 2005, available at http://www.hln.be/hln/cch/det/art_75076.html. In a prior statement, the responsible Belgian minister acknowledged that the railway line cannot be used before 2015 at the earliest, due to the reconstruction work that needs to be done before it can be reopened, '*IJzeren Rijn*: Vande Lanotte is hoopvol', *Het Laatste Nieuws*, 27 May 2005, available at http://www.hln.be/hln/cch/det/art_65500.html.
36. See 'Eerste deel *IJzeren Rijn* in oktober open', *NRC Handelsblad*, 9 July 2005.

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of jurisdiction by essentially relinquishing its jurisdiction to the ECJ, the other two tribunals opted for a collision course by asserting their jurisdiction regardless of the possibility that the ECJ might have jurisdiction and thus could subsequently render a possibly conflicting judgment on the same issue.

The divergent approach of the arbitral tribunals can to a certain extent be explained by the different attitudes adopted by the parties involved in the various disputes. Whereas in the *MOX Plant* case the United Kingdom explicitly raised Article 292 EC as a serious objection against the jurisdiction of the UNCLOS and OSPAR arbitral tribunals, in the *IJzeren Rijn* case the Netherlands and Belgium, while acknowledging that Community law was potentially at issue, narrowed down the scope of the dispute so as to exclude Community law and thus reduce the relevancy of Article 292 EC as much as possible.

The main reason for the divergent approaches of the arbitral tribunals, however, lies in the different understandings of the relationship between Community law and international law. It is therefore appropriate to discuss some specific characteristics of EC law regarding international law before analysing the approach of the three arbitral tribunals in more detail.

4.1. The supremacy of EC law over international law

While it is impossible in this article to discuss at length the legal status of international law in the Community legal order,[37] the following fundamental aspects should be kept in mind.

The EC has an international legal personality (Art. 281 EC) and participates actively in the creation and execution of international law by ratifying international treaties and being party to international organizations.[38] All binding international law that emanates from this participation on the international plane is 'communitarized' by the EC into the Community legal order, that is, those parts of international law that fall within the competence of the EC become an integral part of the Community legal order.[39] Whereas the status of communitarized international law is not explicitly mentioned in the EC Treaty, the ECJ has stated that international law that is an integral part of the Community legal order is placed below primary EC law (the EC Treaty) but above secondary EC law (Regulation and Directives). In other words, communitarized international law enjoys supremacy over conflicting secondary EC law but not over primary EC law.[40] Moreover, communitarized international law

37. See more extensively N. Lavranos, *Decisions of International Organizations in the European and Domestic Legal Orders of selected EU Member States* (2004), with further references.

38. See, e.g., P. Eeckhout, *The External Relations of the EU* (2004); D. Verwey, *The EC, the EU and the International Law of Treaties* (2004).

39. See, e.g., Case 12/86 (*Demirel*) [1987] ECR 3719; Opinion of AG Geelhoed in case C-344/04 (*International Air Transport et al.*) of 8 September 2005, available at http://curia.eu.int/jurisp/cgi-bin/form.pl?lang = en.

40. In this context it should be noted that in its *Schmidberger* ruling, case C-112/00 (*Schmidberger*) [2003] ECR I-5659, the ECJ – exceptionally – placed the European Convention on Human Rights (ECHR) even above the EC Treaty. But this judgment has been unique and reflects the special status of the ECHR within the Community legal order and supposedly does not apply to other 'ordinary' communitarized international treaties. More recently the Court of First Instance of the European Communities placed the UN Charter and UN Security Council resolutions above the EC Treaty in its judgment in cases T-306/01 (*Yusuf*) and T-315/01 (*Kadi*) both of 21 September 2005.

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enjoys – just as does ordinary EC law – supremacy over all national law (including constitutional law) of the EC member states. This means that because the EC has ratified UNCLOS and OSPAR, all those parts of these treaties that fall within the competence of the EC are an integral part of the Community legal order and enjoy the legal status as explained above. Hence, from the point of view of Community law, primary EC law – including Article 292 EC – is the supreme legal order for the EC as well as the EC member states.

However, the question arises of whether this supremacy of EC law must also be accepted from the point of view of international law.[41] Basically, international law has two components: customary international law and treaty law. While customary international law is binding on all states, treaties are binding only on the parties to them. A treaty is thus a means by which rules of customary international law may be changed, subject to the limits set by *jus cogens*. The EC (and the EU) was created by treaty. Thus, all forms of Community law – including the extent of the jurisdiction of the ECJ – depend for their validity on the EC Treaty. In turn, the validity of the EC Treaty depends on international law. However, the fact that the Community legal order is dependent on international law does not mean that it is identical to international law. Indeed, international law permits a group of states to enter into a treaty that lays down new rules of law. These rules displace customary international law as far as those states are concerned. Accordingly, when the EC member states signed the EC Treaty, they had the power under international law to create a self-contained legal system that would apply under the EC Treaty. In fact, from the very beginning of the existence of the EC, the ECJ has acknowledged that the EC member states indeed created a new legal order when it stated that 'by contrast with ordinary international treaties, the EEC Treaty has created its own legal system'.[42] Thus EC law must be regarded as a separate legal order that does not belong to the international or national legal order. Rather, it is a *sui generis* legal order. As a consequence thereof, it could not be argued that EC law is subordinate to international law, rather the Community legal order stands side by side and on the same level with the international legal order, but as a self-contained legal order that applies internally its own hierarchy of norms. Therefore the international legal order cannot superimpose itself on the Community legal order, but rather has to accept the supremacy of Community law over international law that is applied within the EC and its member states. As will be discussed below in more detail, this reasoning ultimately also applies to the OSPAR arbitral tribunal or indeed any other international court or tribunal that is faced with the possible application of Community law in a dispute between two EC member states. Consequently, from the point of view of international law, the supremacy of Community law within the EC and its member states must be accepted.

Naturally, these conclusions also affect the jurisdiction of the ECJ.

41. See, e.g., T. Hartley, *European Union Law in a Global Context* (2004).
42. Case 26/62 (*van Gend & Loos*) [1962] ECR 95, stating that the Community constitutes a new legal order of international law; Case 6/64 (*Costa v. ENEL*) [1964] ECR 685, stating that the EEC Treaty has created its own legal system.

4.2. The exclusive jurisdiction of the ECJ

According to Article 220 EC, the primary task of the ECJ is to ensure that the law is observed. The jurisdiction of the ECJ covers all Community law that falls within the competence of the EC – including communitarized international law. The ECJ exercises this task on the basis of the principle of exclusive final authoritative jurisdiction. This means that it is the ECJ, as the supreme court of the EC and its member states, which determines the interpretation and application of all Community law – including communitarized international law.[43] The main concern for the ECJ is to ensure consistency and uniformity of Community law in all EC member states.[44] In order to achieve this aim a number of mechanisms have been put in place. First, there is no possibility of appealing against a final ruling of the ECJ. Second, Article 234 EC provides for the preliminary ruling procedure, which creates close co-operation between the ECJ and the national courts of the EC member states by enabling them to ask the ECJ questions on the correct interpretation and application of EC law. In fact, the ECJ has developed a jurisprudence containing strict requirements for the national courts. This jurisprudence entails that – in principle – national courts are obliged to request a preliminary ruling from the ECJ if they are unsure about the correct application or interpretation of Community law (so-called CILFIT conditions).[45] Failing to do so, in particular by the highest national courts, can result in liability of the EC member state concerned.[46] Third, a ruling of the ECJ, while de jure binding only for the parties in a specific case, is de facto binding on all national courts of the EC member states and obviously also enjoys supremacy over all national jurisprudence. Finally and most importantly for our purposes, Article 292 EC stipulates – without allowing for exceptions – that all disputes between two EC member states involving Community law must be brought exclusively before the ECJ.[47]

Considering the points just mentioned, the requirement of exclusive and final jurisdiction of the ECJ as enshrined in Article 292 EC is an obvious and necessary provision for ensuring the supremacy, unity, and consistency of EC law. If EC member states were permitted to settle their disputes involving Community law before a court or tribunal of their choice, that is, a forum other than the ECJ, the chances of inconsistency and indeed fragmentation of EC law would be very high. Moreover, the ECJ would lose much of its authority vis-à-vis the EC member states and also vis-à-vis the domestic courts of the EC member states. Indeed, the ECJ emphasized these points in its Opinion 1/91[48] regarding the creation of the European Economic Area (EEA) and the planned establishment of the EEA court. The ECJ underlined its

43. See extensively Lavranos, *supra* note 37.
44. See in particular Case 314/85 (*Foto-Frost*) [1987] ECR 4199.
45. Case 283/81 (*CILFIT*) [1982] ECR 3415.
46. Case C-244/01 (*Köbler*) [2003] ECR I-10239.
47. See for details on Article 292 EC, K. Lenaerts and P. Van Nuffel, *Constitutional Law of the EU* (2005), 445; G. zur Hausen, 'Article 292 EG', in H. von der Groeben and J. Schwarze (eds.), *Kommentar zum Vertrag über die EU und Gründung der EG*, Vol. 4 (2004), 1485; J. Zimmerling, 'Article 292 EGV', in C. Lenz and K.-D. Borchardt (eds.), *Kommentar zum EU- und EG-Vertrag* (2003), 2292.
48. ECJ Opinion 1/91 (*EEA*) [1991] ECR I-6079.

concerns regarding the jurisdiction of the EEA court when it stated that

> 35. It follows that the jurisdiction conferred on the EEA Court under Article 2(c), Article 96(1)(a) and Article 117(1) of the agreement is *likely adversely to affect the allocation of responsibilities defined in the Treaties, and, hence, the autonomy of the Community legal order, respect of which must be assured by the Court of Justice* pursuant to Article 164 (now Art. 220 EC) EEC Treaty. *This exclusive jurisdiction of the Court of Justice is confirmed by Article 219 (now Art. 292 EC) EEC Treaty, under which Member States undertake not to submit a dispute concerning the interpretation or application of that treaty to any method of settlement other than those provided for in the Treaty.* . . .
>
> 36. Consequently, to confer jurisdiction on the EEA Court is incompatible with Community law.
>
> . . .
>
> 62. It must further be observed that the interpretation of the agreement provided by the Court of Justice in response to questions put by courts and tribunals in EFTA States also has to be taken into account by courts in Member States of the Community when they have to rule on the application of that agreement. *However, the fact that the answers are not binding on the EFTA courts may give rise to uncertainty about their legal value for courts in Member States of the Community.*
>
> 63. Furthermore, the possibility cannot be ruled out that courts in the Member States will be led to consider that the non-binding effect of interpretations given by the Court of Justice under Protocol 34 also extends to judgments given by the Court of Justice under Article 177 (now Art. 234 EC) of the EEC Treaty.
>
> 64. *To that extent, the machinery in question will have adverse impact on legal certainty, which is essential for the proper operation of the preliminary rulings procedure.*
>
> 65. *It follows from the above considerations that Article 104(2) of the agreement and Protocol 34 thereto are incompatible with Community law in so far as they do not guarantee that the answers which the Court of Justice may be called upon to give pursuant to that protocol will have a binding effect.*[49]

To sum up, the specific characteristics of Community law entail a number of important consequences. First, primary EC law (the EC Treaty) is the supreme legal order within the EC and its member states. Second, Community law is a new legal order in the sense of being a self-contained legal system that exists next to the international legal order. Third, the ECJ determines exclusively and in fine the application and interpretation of communitarized international law that is binding on all EC member states and their courts. Fourth, and as a direct consequence of the previous point, Article 292 EC effectively takes away the freedom of the EC member states to settle disputes that (also) involve Community law before a court or tribunal of their choice other than the ECJ. Finally, as will be discussed in more detail below, these specific characteristics of Community law also affect the jurisdiction of international courts and tribunals when they are called on to decide a dispute between EC member states that potentially involves EC law aspects.

It is in this context that the approaches taken by the UNCLOS, OSPAR, and *IJzeren Rijn* arbitral tribunals will be analysed in more detail.

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49. Ibid. (emphasis added).

4.3. The UNCLOS arbitral tribunal

In the *MOX Plant* dispute it was apparent that EC environmental legislation as well as Euratom provisions were at issue, such that UNCLOS probably needed to be applied and interpreted in the light of EC law and relevant ECJ jurisprudence. This is especially true because the EC and its member states have ratified the UNCLOS as a mixed agreement,[50] which means that UNCLOS has become an integral part of the Community legal order. As a result, the ECJ has jurisdiction to interpret UNCLOS regarding all aspects that do not fall within the exclusive competence of the EC member states.

Taking all these points into account and the fact that the *MOX Plant* dispute is between two EC member states, the UNCLOS arbitral tribunal acted – in my view – correctly in staying the proceedings and requesting the parties to find out first whether or not the ECJ had jurisdiction in this dispute before it would render its award. In this way the UNCLOS arbitral tribunal was able to honour the possibilities of forum choice provided for in UNCLOS, while at the same time respecting the supremacy of EC law and the exclusive jurisdiction of the ECJ as enshrined in Article 292 EC. More importantly, the UNCLOS arbitral tribunal prevented all problems that would arise out of a concurrence of jurisdiction and the possibility of two conflicting rulings on the same matter. In this context, it must be welcomed that the European Commission brought the *MOX Plant* case before the ECJ so that the ECJ would have the opportunity to rule on the scope of its jurisdiction and thus also on the extent of the freedom of EC member states to bring disputes involving EC law before other international courts or tribunals.[51] If the ECJ accepts jurisdiction in this dispute and renders a judgment, it will be a final ruling that will bind the EC member states, such that the UNCLOS arbitral tribunal will not render an award. Hence the danger of fragmentation associated with concurring jurisdiction and opposing rulings on the same matter would be effectively prevented at the price of taking away the freedom of EC member states to choose other available dispute settlement mechanisms.

4.4. The OSPAR arbitral tribunal

In contrast to the approach adopted by the UNCLOS arbitral tribunal, the OSPAR arbitral tribunal not only disregarded the possible jurisdiction of the ECJ in the *MOX Plant* dispute, but even proceeded to interpret and apply the OSPAR obligations regarding information disclosure very narrowly and in clear conflict with the much broader jurisprudence of the ECJ.[52] Because the OSPAR Convention has also been ratified by the EC[53] and thus has become an integral part of the Community legal order and because two EC member states were involved in this dispute, it would have been more appropriate for the OSPAR arbitral tribunal to interpret and apply the

50. Council Decision 98/392/EEC of 23 March 1998 concerning the conclusion by the EC of the UN Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof, [1998] OJ L 179/1.
51. See *supra* note 10.
52. See, e.g., *Housieaux*, *Commission v. France*, *Glawischnig*, *Commission v. Germany*, *Wilhelm Mecklenburg v. Kreis Pinneberg – Der Landrat*, all *supra* note 16.
53. Council Decision 98/249/EC of 7 October 1997 on the conclusion of the Convention for the protection of the marine environment of the north-east Atlantic (OSPAR), [1998] OJ L 104/1.

OSPAR obligations in line with ECJ jurisprudence. Indeed, the narrow interpretation of information disclosure given by the OSPAR arbitral tribunal is difficult to reconcile with other applicable international standards developed in Community law (EC Directives 90/313 and 2003/4) and in the Aarhus Convention of 1998, which has also been ratified by the EC.[54] In fact, in the *Glawischnig* case, the ECJ emphasized that

> 24. *The Community legislature's intention was to make the concept of 'information relating to the environment' defined in Article 2(a) of Directive 90/313 a broad one*, and it avoided giving that concept a definition which could have had the effect of excluding from the scope of that directive any of the activities engaged in by the public authorities (see Mecklenburg, paragraphs 19 and 20).[55]

Hence, if the OSPAR arbitral tribunal had taken cognizance of the broad concept of 'information relating to the environment' applied by the ECJ, it would probably have come to a different conclusion, namely that the United Kingdom was obliged to disclose the information sought by Ireland.

While an OSPAR arbitral tribunal is obviously not legally bound by ECJ jurisprudence, deciding the case in line with Community law and the relevant ECJ jurisprudence would have reduced, or even eliminated, the problems that will arise if the ECJ is called on to render a judgment in the same dispute. Indeed, a slightly broader interpretation of Article 32(5)(a) OSPAR clearly allows and – in my view – indeed requires OSPAR arbitral tribunals to take all relevant rules of international law, including EC law, into account when deciding a dispute. In other words, the OSPAR Convention itself offers the means of an appropriate resolution of the problem of concurring jurisdiction. Accordingly, a broader understanding of Article 32(5)(a) OSPAR would have enabled the OSPAR arbitral tribunal in the *MOX Plant* case to interpret and apply the OSPAR Convention in the light of EC law and relevant ECJ jurisprudence without overstretching its jurisdiction. That would also have been in accordance with the principle of comity between international courts and tribunals.[56]

However, the best option for the OSPAR arbitral tribunal would have been to follow the approach of the UNCLOS arbitral tribunal by staying the proceedings and asking the parties to find out first whether or not the ECJ had jurisdiction. If the ECJ had asserted jurisdiction in this case, the OSPAR arbitral tribunal would then have had to relinquish its jurisdiction and refuse to render an award. However, by not doing so, the OSPAR arbitral tribunal created a serious problem of concurrence of jurisdiction. Indeed, the European Commission could bring an action against Ireland and the United Kingdom for violating Community law. If the ECJ accepts jurisdiction in this case, it will be possible for it to render a conflicting judgment by interpreting the information disclosure obligation much more broadly than did the OSPAR arbitral tribunal. In this case, the question will arise as to which judgment

54. Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the EC, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, [2005] OJ L 124/1; see also Shany, *supra* note 4, at 816.
55. *Glawischnig supra* note 16, at 5995 (emphasis added).
56. See Shany, *supra* note 3, 278 et seq.; see also section 5.2 *infra*.

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should be followed. As explained before, due to the supremacy of EC law, a possible ECJ judgment would enjoy supremacy over the OSPAR award and would be the supreme judgment for the EC member states. Obviously, an even more complicated situation could arise in the case of a dispute between an EC member state and a non-EC member state: which jurisprudence should be followed? It seems to me that in such a case an OSPAR arbitral tribunal should follow – as much as possible – the ECJ jurisprudence even though it would not be legally obliged to do so. In this way the OSPAR arbitral tribunal would avoid the creation of conflicting legal obligations for the EC member state concerned. In addition, the arbitral tribunal would show respect for and recognition of the relevant ECJ jurisprudence, which in turn would help to ensure a high level of consistency and uniformity of OSPAR law.

However, in the *MOX Plant* case the OSPAR arbitral tribunal opted for ignoring EC law and thereby created more problems than it actually solved.

4.5. The *IJzeren Rijn* arbitral tribunal

The situation in the *IJzeren Rijn* case was different in the sense that the parties involved did not deny the potential applicability of EC law but did argue that EC law was actually not relevant for determining the dispute. Neither of the parties seriously challenged the jurisdiction of the arbitral tribunal, which also came to the conclusion that it could render its award without having to interpret or apply Community law. However, in coming to that conclusion, the arbitral tribunal did nothing other than interpret Community law (Arts. 154–156 EC, the EC Habitats Directive, and Art. 10 EC), spending 15 pages of its award on it before concluding that it was not relevant! Why would the arbitral tribunal find it 'necessary' to examine extensively the relevance of EC law if this was – supposedly – from the outset not relevant at all to the dispute?[57]

In fact, the *IJzeren Rijn* arbitral tribunal misunderstood Community law aspects in this case on several points.

The first misunderstanding concerned the starting point of the arbitral tribunal's analysis of Community law. The arbitral tribunal began its analysis by stating that 'it finds itself in a position *analogous to that of a domestic court within the EC*'.[58] However, this analogy fails, since the tribunal can only be considered to be an international tribunal asked to adjudicate a dispute between two sovereign states and not between two private parties or a private party and a state. Indeed, a quick look at the straightforward jurisprudence of the ECJ on this aspect – albeit regarding private law arbitral tribunals – clearly confirms this conclusion. The ECJ recently summarized its jurisprudence on this point as follows:

> 12. In order to determine whether a body making a reference is a court or tribunal of a Member State for the purposes of Article 234 EC, the Court takes account of a *number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent* (see, in particular, Case C-54/96 Dorsch Consult [1997] ECR

57. See *IJzeren Rijn*, Arbitral Award, *supra* note 20, paras. 107 et seq.
58. Ibid., para. 103 (emphasis added).

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> I-4961, paragraph 23, and the case-law there cited, and Case C-519/99 Schmid [2002] ECR I-4573, paragraph 34).
>
> 13. *Under the Court's case-law, an arbitration tribunal is not a court or tribunal of a Member State within the meaning of Article 234 EC* where the parties are under no obligation, in law or in fact, to refer their disputes to arbitration and the public authorities of the Member State concerned are not involved in the decision to opt for arbitration nor required to intervene of their own accord in the proceedings before the arbitrator (Case 102/81 Nordsee' Deutsche Hochseefischerei [1982] ECR 1095, paragraphs 10 to 12, and Case C-126/97 Eco Swiss [1999] ECR I-3055, paragraph 34).[59]

This jurisprudence, it is submitted, applies similarly to arbitral tribunals established under public international law and thus confirms the conclusion that the *IJzeren Rijn* arbitral tribunal does not meet the requirements of Article 234 EC.

The second misunderstanding of the arbitral tribunal flowed directly from the first, namely the application of the CILFIT conditions. Because the arbitral tribunal considered itself in the same position as a national court of an EC member state, it thought it necessary to apply the CILFIT conditions. The arbitral tribunal argued that only if the application of EC law is 'necessary' in the sense of Article 234 EC would Article 292 EC be triggered. In its view, the CILFIT conditions would determine this issue. In other words, the arbitral tribunal combined Articles 292 and 234 EC. However, the CILFIT conditions only determine the cases in which the domestic courts are – exceptionally – released from their general obligation to request a preliminary ruling from the ECJ when they consider it necessary to render a judgment. This does not affect in any way their general obligation to apply Community law and to follow the jurisprudence of the ECJ at all times.[60] Moreover, the CILFIT conditions – or rather Article 234 EC – have systematically nothing to do with Article 292 EC. Article 234 EC and the CILFIT conditions concern the *vertical* relationship between the ECJ and the national courts of the EC member states, while Article 292 EC concerns the *horizontal* relationship between two EC member states. Indeed, the provisions are found in different parts of the EC Treaty, that is, Article 234 EC is situated in section 4 entitled 'The Court of Justice' within Part Five 'Institutions of the Community', Title I 'Provisions governing the Institutions', Chapter 1 'The institutions' of the EC Treaty, whereas Article 292 EC is placed in Part Six 'General and Final Provisions' of the EC Treaty. In any case, since the *IJzeren Rijn* arbitral tribunal does not meet the criteria of a domestic court within the meaning of Article 234 EC and therefore could not request a preliminary ruling from the ECJ, it was superfluous to consider the CILFIT conditions at all.

But even the analogous application of Article 234 EC and the CILFIT conditions – as the *IJzeren Rijn* arbitral tribunal claimed to have done – fails because, as will be explained in the next section, the application or interpretation of EC law was clearly 'necessary' within the meaning of Article 234 EC to decide the dispute. In other words, the dispute could not have been decided appropriately without applying or interpreting EC law. If the arbitral tribunal had come to this conclusion, it would

59. Case C-125/04 (*Denuit/Cordenier v. Transorient*), [2005] ECR I-923 (emphasis added); see generally N. Shelkoplyas, *The Application of EC Law in Arbitral Proceedings* (2003).
60. See in this regard Case C-224/01 (*Köbler*) [2003] ECR I-10239, paras. 117–118.

have had to examine further the other two CILFIT conditions, that is, whether the ECJ had already determined in its jurisprudence a case similar to the *IJzeren Rijn* dispute or whether the jurisprudence of the ECJ regarding Article 6 Habitats Directive is so clear and obvious that a request for a preliminary ruling would be superfluous (*acte clair* and *acte éclairé*). Without going into a detailed discussion here, it suffices to mention that a rich case-law on Article 6 of the Habitats Directive exists and that at first glance no case similar to the *IJzeren Rijn* dispute has been decided by the ECJ.[61] Moreover, a recent case illustrates that even the extension of an existing golf course into a specially protected area designated on the basis of the Habitats and Bird Directives was judged by the ECJ to be incompatible with these directives.[62] Hence it seems reasonable to argue that the reopening of the IJzeren Rijn railway line through the specially protected Meinweg area could be considered to be incompatible as well. As a result, the *IJzeren Rijn* arbitral tribunal would have had to conclude that a preliminary ruling from the ECJ was necessary in order to decide the dispute. But since the arbitral tribunal could not request such a preliminary ruling, it was obliged to reject jurisdiction and refer the parties to the ECJ.

The third misunderstanding concerned the failure to give supremacy to the EC Habitats Directive over Dutch environmental legislation. As the arbitral tribunal stated, the designation of the Meinweg area as a special area of conservation took place in accordance with the EC Habitats Directive. Nonetheless, the arbitral tribunal came to the conclusion that

> the Tribunal has examined whether it would arrive at different conclusions . . . if the Habitats Directive did not exist. The Tribunal answers this question in the negative, as its decision would be the same on the basis of the Article XII 1839 Treaty and of Netherlands environmental legislation alone. Hence the questions of EC law debated by the parties are not determinative, or conclusive for the Tribunal; it is not necessary for the Tribunal to interpret the Habitats Directive in order to render its award. Therefore, Article 292 is not triggered.[63]

Obviously, from the point of view of the supremacy of EC law, it is the Habitats Directive that enjoys supremacy over Dutch environmental legislation, regardless of whether the application or interpretation of the Habitats Directive would lead to a different result.

The fourth misunderstanding concerned the actual relevance of the EC Habitats Directive to the case. Belgium argued that the dispute was essentially only about money and thus had nothing to do with EC law. Indeed, the arbitral tribunal went as far as stating that 'the parties do not appear to be in dispute concerning the "interpretation or application" of the relevant provisions of EC law (and thus it seems that in this regard a "dispute" within the meaning of Article 292 EC has not arisen at all)'.[64]

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61. See, e.g., Case C-6/04 (*Commission v. UK*) Judgment of the ECJ of 20 October 2005; Case C-127/02 (*Landelijke Vereniging tot Behoud van de Waddenzee*) [2004] ECR I-7405; Case C-143/02 (*Commission v. Italy*) [2003] ECR I-2877; Case C-117/00 (*Commisssion v. Ireland*) [2002] ECR I-5335; Case C-371/98 (*WWF*) [2002] ECR I-9235; Case C-44/95 (*Royal Society for the Protection of Birds*) [1996] ECR I-3805.
62. Case C-209/02 (*Commission v. Austria*) [2004] ECR I-1211.
63. *IJzeren Rijn*, Arbitral Award, *supra* note 20, para. 137.
64. Ibid., para. 107.

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It may be true that – at first glance – this dispute is only about the question of which party has to pay the costs. However, to answer this question, it must first be determined under which conditions a reopening of the railway line is allowed – in view of, primarily, the applicable EC environmental legislation and, supplementarily, domestic environmental legislation. This question must be answered in the first place on the basis of the EC Habitats Directive and the relevant jurisprudence of the ECJ. Consequently, this dispute was clearly not only about the apportionment of the costs but first and foremost about the application and interpretation of the EC Habitats Directive regarding the reopening of a railway track in an area that was supposed to be protected from such activities. The treaties of 1839 and 1897 obviously do not contain any references to the requirements for creating specially protected habitat areas or performing environmental assessment studies as Article 6 of the EC Habitats Directive requires. Consequently, the *IJzeren Rijn* arbitral tribunal had to examine the conditions under which the Habitats Directive would allow a reopening of the track. Moreover, if the arbitral tribunal had come to the conclusion that this was not allowed due to the negative impact on the environment, the question would have had to be addressed as to whether other EC law aspects, for instance the free movement of goods, were affected and whether such a restriction would be justified. Because the *IJzeren Rijn* arbitral tribunal decided that EC law was not relevant, it did not address these issues at all.

Thus it must be concluded that the *IJzeren Rijn* arbitral tribunal failed to draw the only appropriate conclusion, namely to decline jurisdiction because EC law was relevant in this dispute which in turn would trigger the exclusive jurisdiction of the ECJ (Art. 292 EC). Moreover, it appears that the arbitral tribunal mixed up the issue of jurisdiction (Art. 292 EC) with the issue of the obligation by national courts to request a preliminary ruling (Art. 234 EC in conjunction with CILFIT conditions). However, what is most disturbing in my view is the fact that the *IJzeren Rijn* arbitral tribunal handled the dispute as if Community law or the EC did not exist at all, thus creating a fiction of deciding the case as if it were the year 1899.

If the European Commission were to decide to bring proceedings against the Netherlands and Belgium for violating Article 292 EC, the ECJ could render a conflicting judgment in this dispute, which would enjoy supremacy over the arbitral tribunal award. Of course, if the Commission were not to take any action (or any other EC member state on the basis of Art. 227 EC, which is highly unlikely), the ECJ would not be seized with the dispute and thus could not render a judgment and hence the arbitral award would remain valid. Indeed, on the basis of information obtained off the record, it appears that the Commission does not intend to take any action in this case. This seems inconsistent, since there is no difference – from the point of view of Community law – between the *MOX Plant* and *IJzeren Rijn* cases regarding the potential violation of Article 292 EC. Thus in this case the parties managed to circumvent their obligations under Article 292 EC, even though they were clearly aware of the fact that the ECJ most likely had jurisdiction in this dispute, by successfully persuading the arbitral tribunal that Article 292 EC was not triggered in this case. Indeed, both the *IJzeren Rijn* arbitral tribunal and the European Commission seem to be content with this very dubious outcome.

5. Conclusion

It has been shown in this article that an intensification of the concurrence of jurisdiction between the various international courts and tribunals – including regional courts such as the ECJ and the European Court of Human Rights (ECrtHR)[65] – is currently taking place. While the phenomenon of concurrence of jurisdiction as such is not the problem, the problems begin with the rendering of conflicting rulings on the same issue of law and in the same dispute. This causes a host of problems such as legal uncertainty for the parties, endless proceedings through forum-shopping and re-litigation of the same dispute before different courts and tribunals, creation of 'self-contained' regimes, fragmentation of international law, and, ultimately, deterioration of the authority of dispute settlement mechanisms.[66] Obviously, for all those who believe in the strengthening of international law and the promotion of the judicialization of international relations leading to more effective enforcement of international legal obligations, these are problems that must be tackled by reflecting on possible solutions.

In my view, the key to all solutions is hierarchy, which is illustrated quite clearly if one looks at the experience of the ECJ as regards Community law. This experience shows that the ECJ is able to preserve the unity of Community law within the current 25 EC member states and their domestic courts only with the help of supremacy of Community law coupled with a complete exclusive jurisdiction and the preliminary ruling procedure.

However, in contrast to the Community legal order, in which the ECJ has been made the supreme court in Europe, the international legal order does not contain any such hierarchy. This means that all the various international courts and tribunals that are active in adjudicating disputes involving (parts of) international law can render their rulings and develop the law as they see fit. Because very often similar legal issues are decided from different points of view and by different courts and tribunals (for instance the World Trade Organization and multilateral environmental agreements) the risk of conflicting rulings leading towards inconsistent and fragmentary development of law is very high.[67]

Indeed, if one accepts that a proliferation of international courts and tribunals is actually taking place, then it is inevitable that new instruments must be developed and applied to ensure that the uniformity and consistency of international law is preserved as much as possible.

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65. See the recent judgment of the ECrtHR concerning Community law: *Bosphorus v. Ireland*, Judgment of 30 June 2005, available at ttp://cmiskp.echr.coe.int/tkp197/view.asp?item = 1&portal = hbkm&action = html&highlight = bosphorus&sessionid = 3274358&skin = hudoc-en. See also R. Lawson, 'Nationale Rechter ontsnapt aan Luxemburgs/Straatsburgse Sandwich', (2005) 30–7 *NJCM-Bulletin* 969; N. Lavranos, 'Das Solange-Prinzip im Verhältnis EGMR und EuGH', (2006) 1 *Europarecht* (forthcoming).
66. See generally N. Matz, *Wege zur Koordinierung völkerrechtlicher Verträge* (2005); J. Finke, *Die Paralleliät internationaler Streitbeilegungsmechanismen* (2004); E.-U. Petersmann, 'Proliferation and Fragmentation of Dispute Settlement in International Trade: WTO Dispute Settlement Procedures and Alternative Dispute Resolution Mechanisms', in J. Lacarte and J. Granados (eds.), *Intergovernmental Trade Dispute Settlement: Multilateral and Regional Approaches* (2003), 417.
67. See for a detailed study on the relationship between the dispute settlement systems of the WTO and MEAs J. Neumann, *Die Koordination des WTO-Rechts mit anderen völkerrechtlichen Ordnungen* (2002).

Basically, one could think of creating a hierarchical structure between the various international courts and tribunals on the basis of formal legally binding rules or on the basis of legally non-binding principles. The following possibilities could be considered – with the understanding that they may not be realistic.

5.1. Legally binding options

One could think of extending the currently existing jurisdiction of the ICJ.[68] It should be recalled that currently only 65 out of some 190 states have accepted the jurisdiction of the ICJ, many with substantial reservations.[69] Moreover, its jurisdiction is very limited, in particular in comparison with the ECJ – both in terms of *ratio personae* and *ratio materiae* as well as in terms of the existing optional acceptance of its jurisdiction by the states. Along these lines, one could think of making the ICJ a court of appeal vis-à-vis the other international courts and tribunals. In this way, it would be the ultimate arbiter regarding aspects of public international law and, accordingly, in a position of providing binding interpretations and thus ensuring homogeneity in the application of public international law. In other words, a clear hierarchical structure would be introduced in which the ICJ would be above the other international courts and tribunals. The role as a court of appeal could be especially effectively played by the ICJ if it were to become a compulsory court of appeal for all international courts and tribunals. This, however, would require the extension of the *ratio personae* and *ratio materiae* so that natural and legal persons would also have *locus standi*, as is the case in several international courts and tribunals. This model would also require a general acceptance by the ECJ of the supreme role of the ICJ regarding the interpretation and application of international law. Indeed, the ECJ has already accepted the ECrtHR as the supreme court regarding the interpretation of fundamental rights.[70] So there is no reason to assume that the ECJ could not do the same with regard to the ICJ. A less far-reaching option would be to establish a court of appeal hierarchy on a case-by-case basis and for a limited number of international courts and tribunals, for instance, in regard to the ITLOS, the International Criminal Court (ICC), and the International Criminal Tribunal for the former Yugoslavia (ICTY).

Another way of establishing a hierarchical structure between the ICJ and the other international courts and tribunals would be the creation of a preliminary ruling system like that established in the Community legal order (Art. 234 EC).[71] This would mean that the ICJ would be able to receive requests for preliminary rulings on issues of public international law from other international courts and tribunals which consider the guidance of the ICJ necessary in order to render their decisions. In this way the ICJ would be able to ensure a high level of uniformity of international

68. See generally T. Sugihara, 'The ICJ – Towards a Higher Role in the International Community', in N. Ando et al. (eds.), *Liber Amicorum Judge Shigeru Oda* (2002), 227.
69. See http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicdeclarations.htm.
70. See Case C-112/00 (*Schmidberger*) [2003] ECR I-5659.
71. See A. Pellet, 'Strengthening the Role of the International Court of Justice as the Principal Judicial Organ of the UN', (2004) 3 *Law and Practice of International Courts and Tribunals* 159; G. Guillaume, 'The Future of International Judicial Institutions', (1995) 44 *International and Comparative Law Quarterly* 848.

law while at the same time leaving the other international courts and tribunals sufficient freedom to decide the specific cases in accordance with the respective requirements. Indeed, one could go a step further by creating a system by which the ICJ would also be able to request preliminary rulings from the other international courts and tribunals, for instance from the ICC on criminal law aspects or from the ITLOS on law of the sea aspects. In this way, the uniformity of international law could be ensured. Compared with a formal court of appeal system, the preliminary ruling system would impose a less strict hierarchical relationship, since every international court or tribunal would decide for itself on a case-by-case basis whether a preliminary ruling was indeed necessary. Moreover, the creation of a preliminary ruling system would also enhance communication and co-operation between the ICJ and the other international courts and tribunals, which in turn could further strengthen the uniformity and consistency of international law by reducing the risk of conflicting judgments on the same issue.

A less far-reaching proposal would be to extend the already existing advisory jurisdiction of the ICJ by broadening the group of organs and bodies that can request an advisory opinion from the ICJ.[72] Currently, only a very limited number of organs and bodies can request an advisory opinion, despite the fact that advisory opinions of the ICJ have been very influential in determining a number of fundamental aspects of international law. This proposal is particularly attractive as it would involve comparatively little change to the UN Charter and the ICJ Statute. At the same time, however, the hierarchical structure would be quite loose so that the ability of the ICJ to ensure a high level of uniform interpretation of international law would remain limited.

Another idea is the creation of a Tribunal des Conflits. This idea is borrowed from the French judicial system, which years ago created a Tribunal des Conflits to resolve disputes between the two main branches of law concerning which of the two branches has jurisdiction over a certain case.[73] The Tribunal des Conflits is composed of three members of the Conseil d'Etat (supreme administrative court), three members of the Cour de Cassation (supreme civil/criminal court) and two other members. In other words, the Tribunal des Conflits is composed of judges of the two supreme courts and has the task of deciding which of the courts has jurisdiction to adjudicate a case when both branches of the courts (i.e. administrative or civil/criminal branch) claim jurisdiction over the same case. Regarding the international law level, one could think of a 'Tribunal des Conflits de jurisdiction internationale' – composed of an equal number of members of the ICJ (for instance six ICJ judges) and members of some of the other international courts and tribunals (one ICTY judge, one judge from the International Criminal Tribunal for Rwanda, one ICC judge, one ITLOS judge, one arbitral tribunal member, and one World Trade Organization Appellate Body member) plus one independent member who would

72. P.-M. Dupuy, 'The Danger of Fragmentation or Unification of the International Legal System and the ICJ', (1999) 31 *NYU Journal of International Law and Politics* 791.

73. It should be noted that such a court is known in other jurisdictions as well. For instance, in Israel a similar court exists that determines jurisdictional conflicts between religious courts.

come together in order to determine in fine which court or tribunal has jurisdiction in a certain case and to give final interpretations on issues of international law that have been interpreted differently by the various international courts and tribunals. The advantage of this proposal would be the creation of a new overarching tribunal with a tailor-made, flexible statute that would serve needs without encountering the great difficulties inherent in reforming the currently existing system. Moreover, the equal participation of the other international courts and tribunals in such a Tribunal des Conflits would ensure a consistent exchange of ideas and compromise that would find support from all international courts and tribunals. Accordingly, a high-level acceptance of a uniform interpretation of international law aspects could be secured with relatively little legal complication.

5.2. Legally non-binding options

As to the legally non-binding options, one could think of principles such as judicial comity, *res judicata*, and *lis pendens*. For instance, one author claims that all judicial bodies have a legal duty to take into account decisions of other international courts and tribunals on the same issue and to act in good faith, that is, follow that decision unless there are overwhelming reasons not to do so which in turn should be clearly set out by the court that wishes to deviate.[74] In other words, international courts and tribunals should exercise judicial comity as much as possible.[75] Hence all international courts and tribunals should respect each other and take the others' decisions into account as guidance. This legal obligation flows from the need to ensure consistency within the same system of international law in which all international courts and tribunals operate.[76] The principle of good faith, while usually applied in international law to state obligations, is considered here more broadly, and thus applies also to international courts and tribunals when they apply and develop international law. Although this approach fits nicely with the idea of a global community of courts as posited by Anne-Marie Slaughter,[77] the problems are that this obligation is a moral rather than a legal one and that – due to the lack of any hierarchical order between the various international courts and tribunals – nothing can prevent an international court or tribunal from deviating from the case-law of the ICJ.

The *res judicata* principle allows a court to decline jurisdiction based on an earlier ruling by another court or tribunal on the same matter. In other words, the *res judicata* principle ensures the finality of proceedings by excluding a re-litigation of the same dispute before another court or tribunal.[78] The *lis pendens* principle bars proceedings

74. See Martinez, *supra* note 3, at 487 et seq.; M. Shahabuddeen, 'Consistency in holdings of International Tribunals', in Ando et al., *supra* note 68, at 633.
75. See generally Shany, *supra* note 3, at 278 et seq.
76. Shahabuddeen, *supra* note 74, at 646–7.
77. See A.-M. Slaughter, *A New World Order* (2004), ch. 2; see for a critical analysis of Slaughter's ideas A. Mills and T. Stephens, 'Challenging the Role of Judges in Slaughter's Liberal Theory of International Law', (2005) 18 *Leiden Journal of International Law* 1.
78. See generally C. Söderlund, '*Lis Pendens*, *Res Judicata* and the Issue of Parallel Judicial Proceedings', (2005) 22 *Journal of International Arbitration* 301; A. Reinisch, 'The Use and Limits of *Res Judicata* and *Lis Pendens*', (2004) 3 *The Law and Practice of International Courts and Tribunals* 37.

before a court as long as the same claim is pending before another court or tribunal.[79] In this context, it should be emphasized that there can be no doubt that the *res judicata* and *lis pendens* principles are also applicable in international judicial proceedings.[80] However, there are three conditions for the application of either principle: (i) identity of parties; (ii) identity of object or subject matter, that is, exactly the same issue must be in question; and (iii) identity of the legal cause of action. It is obvious that the second and third conditions in particular raise difficulties of ascertaining whether or not in a given case these conditions are fulfilled.[81] Moreover, even if a court or tribunal concludes that indeed a relevant earlier decision of another court or tribunal exists, it can still decide to proceed with the case since that court is not legally bound to take the other decision into account. Nonetheless, the application of the *res judicata* and *lis pendens* principles could certainly help to reduce the number of conflicting judgments by denying parties the possibility of re-litigating the same dispute in the hope of a different outcome. Furthermore, respect for and acceptance of a final decision by an international court or tribunal increases legal certainty and also increases the authority and credibility of the various international courts and tribunals in general.[82]

In sum, it can be concluded that a number of possible solutions are – at least theoretically – available to resolve the rising tension between the proliferation of international courts and tribunals and the concurrence of jurisdiction that could lead to a fragmentation of international law.

Additionally, Community law itself, especially Article 292 EC, is problematic. In particular, the combination of exclusive jurisdiction of the ECJ on the basis of Article 292 EC and the supremacy and binding effect of its judgments clashes with the increasing number of international courts and tribunals and the exercise of their respective jurisdictions. In view of the *MOX Plant* and *IJzeren Rijn* cases, the question must be asked whether Article 292 EC should be modified so as to allow for more flexibility to accommodate the existence of a growing number of other dispute settlement fora. For instance, Article 292 EC could be changed in the sense that the ECJ would be required to take decisions of arbitral tribunals into account – at least when one of the parties involved is an EC member state. Indeed, one could argue that in such cases the ECJ should decline its jurisdiction until the other international court or tribunal has rendered its decision. In this context, a more general and explicit application of principles such as *lis pendens* and *res judicata* by the ECJ might be useful. This does not, of course, necessarily require a change of the text of the provision.

The upcoming ruling of the ECJ in the *MOX Plant* case provides a first opportunity for reflection and possible modification of Article 292 EC.[83] Until then, more cases involving a concurrence of jurisdiction between the ECJ and other international courts and tribunals can be expected.

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79. See further Shany, *supra* note 3, at 212 et seq.
80. Reinisch, *supra* note 78, at 47–50.
81. Ibid., at 55 et seq.
82. See further Shany, *supra* note 3, at 170 et seq.
83. See *supra* note 10.

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